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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

NO. 48

## CARL H. KOTHE, Trustee,

APPELLEE, PETITIONER HEREIN,

v.

## R. C. TAYLOR TRUST,

APPELLANT, RESPONDENT HEREIN.

IN THE MATTER OF

**HERBERT TURKEL, Bankrupt.**

## BRIEF FOR THE RESPONDENT

IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

GEORGE S. TAFT,
*Attorney for Respondent.*

T. HOVEY GAGE,
*Of Counsel.*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

NO. 762

## CARL H. KOTHE, Trustee,

APPELLEE, PETITIONER HEREIN,

*v.*

## R. C. TAYLOR TRUST,

APPELLANT, RESPONDENT HEREIN.

IN THE MATTER OF

**HERBERT TURKEL, Bankrupt.**

## BRIEF FOR THE RESPONDENT

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# SUPREME COURT OF THE UNITED STATES.

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CARL H. KOTHE, TRUSTEE,
APPELLEE, PETITIONER HEREIN,

*v.*

R. C. TAYLOR TRUST,
APPELLANT, RESPONDENT HEREIN.

IN THE MATTER OF
**HERBERT TURKEL, Bankrupt.**

## Brief for the Respondent,

IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

### I. THE OPINION OF THE COURT BELOW.

The case in the Court below is reported in *30 Fed. (2d) 77.*

### II. STATEMENT OF THE CASE.

The bankrupt was a lessee of the respondent, under a two year lease expiring May 15, 1929, at $4000 per year. Prior to the bankruptcy, the rent had been paid up to Feb. 15, 1928. Prior to said date, the petition in bankruptcy was filed.

The lease contains this provision:

> "the filing of any petition in bankruptcy . . . . . by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease the Lessor shall

> forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof." (Record, P. 4.)

The respondent presented before the Referee a "proof of unsecured debt" for $5000, the consideration of said debt being

> "damages for breach of lease in the amount of $5,000, that being the same as the amount of rent reserved in the lease from February 15, 1928 to May 15, 1929, the end of the term." (Record, P. 2.)

The Referee disallowed the claim. A petition for review was disallowed by the District Court. (Record, P. 5.) The decree of the District Court was reversed. Opinion by Johnson, Circuit Judge, Anderson, J. writing a dissenting opinion (Record, Pp. 11–18).

The petitioner contends in his supporting brief (1) that the question involved is one of "far reaching importance," (2) that the opinion of the Circuit Court of Appeals is "in conflict with the weight of authority," and (3) that the decision is "in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit."

## III. ARGUMENT.

### Summary of the Argument.

*Point A.* The question involved is not of the "far-reaching importance" contended for by the petitioner.

*Point B.* The claim was a demand in existence at the filing of the petition. It was not contingent. The petitioner makes no contention that the claim, if valid in other respects, was contingent.

*Point C.* The opinion is not "in conflict with the weight of authority." The claim presented is not for "rent," but for damages. The agreement was not a "penalty."

*Point D.* The decision is not in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit cited in petitioner's brief.

POINT A.

The single matter decided is that the claim for damages by a lessor of real estate under the lease in question, against the bankrupt estate of his lessee may be allowed, where the lease provides that the filing of a petition by or against the lessee shall be deemed to constitute a breach of the lease, and that thereupon the lease shall be terminated, and where the parties have agreed in the lease that the damages for such breach shall be measured by the amount of rent reserved in the lease for the residue of the term.

Furthermore, in the instant case the lease was for only two years and the rental only $4000 per year. The opinion points out (Record, P. 13) that "The term of the lease was short—two years." The decision goes no further than to hold that in a *two-year lease* containing the provision above cited, the lessor has a provable claim. It would not *necessarily* follow that the lessor would have a provable claim regardless of the length of the lease and the portion thereof remaining unexpired at the time of the bankruptcy of the lessee.

POINT B.

The cases cited in the opinion on page 12 of the Record and at the top of page 13, make it clear that the damages are not dependent upon any contingency. It is not like the case of a lease which provides that upon bankruptcy of the lessee, the lessor *may enter and terminate the lease*, with a further provision concerning damages in such event. (*Slocum v. Soliday, 183 Fed. Rep. 410.*) The distinction is clearly pointed out in *Cotting v. Hooper, 220 Mass. 273 at 276.*

The petitioner makes no contention in his supporting brief that the claim is "contingent" in nature.

POINT C.

The petitioner contends (P. 8 of Brief) that "this is nothing but an agreement for proving non-accruing rent by simply

calling it damages" quoting from the dissenting opinion (Record, P. 18), and cites numerous cases holding that a lessor may not both retake the property and prove a claim for "future installments of rent." It is clear that "Rent issues from the land, is not due until the rent day, and is due in respect of the enjoyment of the premises let." *Filene's Sons Co. v. Weed, 245 U. S. 497.* The difference, however, between "rent," which is a technical word, and damages measured by rent is clearly pointed out in the opinion.

> "For the breach of the lease the lessor was entitled to damages. These damages are fixed as the amount of the rent reserved under the lease. The claim presented by the lessor is therefore not for rent but for damages to which he is entitled under this provision of the lease. The rent reserved for the balance of the term was employed by the parties to measure the damages to which the lessor was entitled." (Record, P. 12).

As is said by Holmes, J. in *Filene's Sons Co. v. Weed, supra:*

> "The contract was not that all the rent for the term should become presently due, it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair."

The petitioner contends that "the provision in the lease was for a penalty, and not liquidated damages." (Petitioner's Brief, P. 8, Second.)

It may be noted at the outset that it is not by any means an altogether one-sided agreement. The lessor, for the privilege of proving a claim for damages and receiving a dividend from the lessee's estate, if there be assets, agrees that bankruptcy shall terminate the lease, and thereby *gives up* all his rights against the lessee himself. In some cases the continuing liability of the lessee would doubtless be worth more to the lessor than his vacant property plus the right to prove his claim for damages. Hence in some of the reported decisions, the question has arisen by an attempt of the lessor

to expunge a claim from the bankrupt's schedule of liabilities, where it has been listed.

*In re Cushman, 3 Fed. (2d) 449.*

The Court knows nothing of the considerations which may have led the parties to make the provision.

The opinion *suggests* (Record, P. 15) that it is not an unreasonable inference that the lessor may have spent "considerable money in the preparation of the property for the use to which the lessee might wish it devoted." It could be equally well suggested that the insertion of the provision was one of the determining factors in fixing the amount of rent, or that because of the provision the lessor did not insist upon any guarantor of the rent. But whatever may have been the considerations, the "language plainly indicates that the parties intended that the sum agreed to be paid, in case of a breach, should be liquidated damages and not a penalty," quoting from the opinion (Record, P. 14).

The question is "whether the intention was to provide for a fixed measure of damages or only to stipulate for a penalty." Bigelow, C. J. in

*Lynde & Another v. Thompson, 2 Allen 456, 459.*

> "We heartily agree with the Court of Appeals in England that so far as precedent permits the proper course is to enforce contracts according to their plain meaning and not to undertake to be wiser than the parties, and therefore that in general when parties say that a sum is payable as liquidated damages they will be taken to mean what they say and will be held to their word." Holmes, C. J. in

*Guerin v. Stacy, 175 Mass. 595, 597.*

> "This whole subject is reviewed in *Sun Printing & Pub. Assoc. v. Moore, 183 U. S. 642, 669* . . . . . where a large number of authorities upon this subject are referred to . . . . . The question always is, What did the parties intend by the language used? When

such intention is ascertained it is ordinarily the duty of the Court to carry it out." Peckham, J. in

*U. S. v. Bethlehem Steel Co., 205 U. S. 105.*

In *Bedard v. Ransom, Inc., 241 Mass. 74,* there was a so-called lease of a truck. The contract called for an initial payment and regular monthly payments thereafter. It provided that upon failure of the lessee to make any regular payment "all sums then remaining unpaid shall at once become due and payable." It also provided that upon such failure, the lessor might repossess itself of the truck, and retain all payments which had been made. The Court says of such a contract:

> "A contract which requires the buyer or lessee to pay the full purchase price, when the property has already been returned, may be a hard and oppressive contract, especially where the property has not been damaged and the payments already made are adequate compensation for its use. On the other hand the parties were free to make such a contract. They have expressly agreed that all sums unpaid are to be considered as liquidated damages, to compensate the seller for the breach of the terms of the contract, which he is authorized to collect. They contracted that the lessor had this right to recover and the contract is enforceable."

The general principle has been thus stated:

> "The contract is to govern; and the true question is What was the contract? Whether it was folly or wisdom for the contracting parties thus to bind themselves is of no consequence if the intention was clear. If there is no fraud, circumvention or illegality in the case the Court is bound to enforce the agreement."

Note to *King Iron Bridge Co. v. St. Louis, 10 L. R. A. 826, at 829,* and
Note to *Condon v. Kemper, 18 L. R. A. 671.*

The petitioner contends (Pp. 9 and 10 of his brief) that while the above principle may control between "the contracting parties," it ought not to control where "the lessee is not the one who will suffer by the enforcement of this provision, but his innocent creditors," and "when the rights of innocent third persons are involved." In short, he contends that it works a fraud upon the creditors.

The opinion says of this argument:

> "It is true that if the claim is allowed it will diminish the dividends to be paid to other creditors, but we are not concerned with this result. The only question presented upon this record is whether or not the claim made by the lessor is a provable one under Section 63 (a) 4 of the Bankruptcy Act of 1898." (Record, P. 13.)

and again,

> "As the agreement is one for liquidated damages, can it be said to be invalid as being a fraud on the creditors of the bankrupt (the lessee), or a preferential transfer or conveyance?
>
> "There was no evidence that the bankrupt intended to defraud his creditors or that the claimant knew of such intention, if it existed. It is, therefore, not void on that account.
>
> "It does not appear that the bankrupt was insolvent when the lease was made; and the covenant in regard to damages, if it could be said to effect a preferential transfer, was plainly not made within four months of the filing of the petition in bankruptcy." (Record, P. 14.)

It might be added that it does not appear that the lessee had any creditors when he entered into the lease, or that his future creditors made any inquiries of the lessee or lessor before extending credit, as to the provisions of the lease then in existence.

All debts absolutely owing by the bankrupt at the time of the filing of the petition, which are founded upon a contract, may be proved and allowed.

A creditor has the right to share in the distribution of the estate of his debtor unless he has been "guilty of some moral turpitude or some breach of duty whereby other creditors were deceived to their damage" constituting such a fraud as to estop him.

*Collier, Vol. 2, 13th Ed. 1385.*

It has been held that a trustee in bankruptcy cannot recover from a lessor rent which has been paid in advance by the lessee, where the lease contained a provision making the rent payable in advance with a further provision that the lessor might terminate the lease upon the bankruptcy of the lessee without forfeiting the rent paid in advance, and where the lessor had so terminated prior to the expiration of the period for which the lessee had paid the rent in advance. It was urged by the trustee in that case that the stipulation was invalid as "providing a penalty" and working a fraud upon the creditors.

*Galbraith v. Wood, 124 Minn. 210.*

## Point D.

The petitioner contends (P. 10 on his brief) that "The Circuit Court of Appeals for the Sixth Circuit had exactly the same question to decide in the case of *In re Miller Bros. Grocery Co., 219 Fed. 851 (C. C. A. 6)* as was decided in this case," and that the case was decided the other way.

In that case, there was a so-called lease of a cash carrier system for the term of seven years, at $250 per year. It provided, not that bankruptcy should *ipso facto* terminate the lease and without entry by the lessor, as in the instant case, but that the lessor might upon bankruptcy of the lessee enter and terminate. It provided, not that the lessor in case of bankruptcy should "be entitled to recover damages," measured by the rent, as in the instant lease, but that "the balance of rental for the entire term shall be considered at once due and payable." The word "damages" is not to be

found in the lease. The lessee became bankrupt during the first year of the term, and the lessor took possession of the leased property and presented a claim for over $1600, the total rental for the entire term being $1750. The claim was disallowed by the Circuit Court of Appeals. The Court held that according to the true intent "the lessor is entitled to the benefit of either the accelerated maturity of rents or the possession of the carrier system, but not of both."

The Court, however, in reaching its conclusion as to the true intent of the lease, discusses the validity of a provision which would give the lessor *both* the right to take possession of the property *and* "at the same time to enforce payment of the rents." It may be conceded that where under the terms of a lease the *act of the lessor* by taking possession is what works a termination of the lease, and where the lessor is given not damages measured upon rents but "the balance of rentals for the entire term," the lessor may not *under such a lease* retake the property and also prove a claim for future rents. But that is not this case. Here, the bankruptcy of the lessee, and not any act of the lessor, terminates the lease; and here the lessor is claiming damages, and not rent.

*Filene's Sons Co. v. Weed, supra.*

The other Sixth Circuit case (*Lamson Co. v. Elliott-Taylor-Woolfenden Co. et al.*, 25 Fed. (2d) 4) is cited by the petitioner (P. 12 of his brief) merely because of what is said in that opinion of *In re Miller Bros. Grocery Co.*

It may be noted that neither of the Sixth Circuit cases is cited in the minority opinion in this case.

## CONCLUSION.

It is therefore respectfully submitted that this case is not one calling for the exercise by this Court of its supervisory powers; that it is not of the "far reaching importance" contended for by the petitioner; that it is not "in conflict with the weight of authority"; that the claim presented is not for rent, but for liquidated damages measured by rent;

that the agreement was not a "penalty"; that being a valid claim, it is not to be disallowed as a fraud upon creditors, merely because it will diminish the dividends to be paid to other creditors; that the opinion is not in conflict with the decisions of the Sixth Circuit, as contended by the petitioner; that the First Circuit committed no error; and that there is no reason why the writ of certiorari should be granted, and why this Court should review the decision of the Circuit Court of Appeals and reverse the same.

Respectfully submitted,

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